No. 9134-Y.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WOODWORKERS TOOL WORKS, INC., a corporation,

Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Jurisdiction.

1. The statutory provisions to sustain the jurisdiction of the District Court are U. S. Code, Title 28, Sec. 1332 [formerly the Act of Mar. 3, 1875, Chap. 137, Sec. 1, 18 Stat. 470, as amended; 28 U. S. C. A., Sec. 41(1)] providing that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 . . . and is between: (1) citizens of different states; . . ."

2. The existence of the jurisdiction is shown by the following allegations in paragraph III of the second amended complaint: "That plaintiff is a citizen of the State of California and defendant is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and

costs, the sum of Three Thousand ($3,000.00) Dollars." [R. 22.]

3. The statutory provisions to sustain the jurisdiction of the Court of Appeals are U. S. Code, Section 1291 [formerly the Act of Mar. 3, 1891, Chap. 517, Sec. 6, 26 Stat. 828, as amended; 28 U. S. C. A., Sec. 225(a)] providing that the "court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."; and U. S. Code, Section 1294 [formerly the Act of Mar. 3, 1891, *supra;* 28 U. S. C. A., Sec. 225(d)] providing that "appeals from reviewable decisions of the district . . . courts shall be taken . . . (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

Statement of the Case.

This is an appeal by Woodworkers Tool Works, Inc., an Illinois corporation, and the defendant below, from an amended judgment entered after a jury verdict.

The second cause of action of the second amended complaint for personal injuries (the first cause of action having been dismissed [R. 35]), alleged that on October 28, 1948, while plaintiff, an employee of E. George Selby doing business as Selby Company, was engaged in cutting lumber with a new Champion panel raiser head he was injured when the said panel raiser head suddenly broke from structural defects. It was further alleged that the said panel raiser head was purchased from the defendant on October 23, 1948, and was installed for use in cutting lumber at the Selby Company plant on October 26, 1948; that defendant was negligent and careless in the manu-

facture, sale and delivery to plaintiff's employer of a structurally defective panel head [R. 22-6].

The answer of defendant denied the negligence alleged, denied that plaintiff's employer purchased said panel raiser head from the defendant and alleged that it did not cast the said panel raised head nor any part thereof. As separate defenses the defendant pleaded contributory negligence upon the part of plaintiff and unavoidable accident [R. 27-31].

Prior to the filing of the second amended complaint plaintiff had filed an amended complaint [R. 2-5] which was served on one E. H. Preuer as agent of Woodworkers Supply Company (not a party to this action) [R. 498]. The defendant Woodworkers Tool Works, Inc., a corporation, then moved for an order dismissing the action pursuant to Rule 12(b) (2-4-5) of the Federal Rules of Civil Procedure on the ground that the Court lacked jurisdiction over the person of the defendant and for insufficiency of process and of the service thereof [R. 6-11]. Said motion was denied [R. 21].

Thereafter plaintiff filed the second amended complaint. No further service of summons was effected. The defendant then moved for an order to dismiss the first count or cause of action [R. 32-4], and said motion was granted [R. 34-6].

At the conclusion of plaintiff's case defendant challenged the sufficiency of the evidence by a motion for judgment of nonsuit on the grounds that there was no evidence that the defendant sold the device to plaintiff's employer and that there was no evidence showing a causal connection between the breaking of the panel raiser head and the in-

jury sustained by the plaintiff, said motion being denied by implication [R. 226-7].

At the close of the trial the defendant moved the Court for a directed verdict on the grounds that no negligence was shown on the part of the defendant and that there was no causal connection between the defect, if any, of the device and the injuries sustained by the plaintiff [R. 425-6]. Reserving ruling on the motion until after the verdict [R. 428] the Court subsequently denied the motion.

The jury returned its verdict in favor of the plaintiff and against the defendant fixing plaintiff's special damages at Eight Thousand Dollars and fixing plaintiff's general damages at One Thousand Dollars [R. 54]. Defendant then moved for a judgment *non obstante veredicto* or in the alternative for a new trial upon the grounds (1) that the verdict was contrary to law, (2) that the evidence was insufficient to justify the verdict and (3) that the Court erred in not granting the motion for nonsuit and in instructing the jury on the doctrine of *res ipsa loquitur* [R. 56]. This motion was likewise denied.

A motion was made by plaintiff to amend the verdict to fix the plaintiff's special damages at $1,000.00 and plaintiff's general damages at $8,000.00 [R. 62]. In support of the motion plaintiff produced an affidavit of George F. Caldwell, foreman of the jury, to the effect that an error was made in filling in the amounts awarded [R. 64]. The motion was granted and an amended judgment was filed fixing the special damages at $1,000.00 and the general damages at $8,000.00 [R. 67].

The facts as adduced at the trial reveal that on October 28, 1948, the plaintiff, William J. Byrne, was employed by the Selby Company, manufacturers of sash and doors

[R. 78]. On the morning of October 28, 1948, he was engaged in operating a shaper when he heard a faint click [R. 142, 165]. He then dropped below the table top and stopped the machine [R. 142, 151, 154]. He remained under the table until "things had stopped dropping" and then got up and first looked at the damaged machine and then discovered that his right hand and little finger were cut [R. 143]. He was then taken to a doctor where the hand was treated [R. 146].

The shaper involved had attached to it a Champion panel raiser head which is a device used to bevel panels [R. 140]. It is the contention of the plaintiff in his complaint that the said panel raiser head, revolving at hundreds of revolutions per minute, suddenly broke from structural defects, a piece of which struck plaintiff [R. 23]. An inspection of the panel raiser head revealed that the casting was broken in two pieces [R. 84], however, plaintiff was not conscious of any object striking him [R. 160] and he did not know what cut his hand [R. 171].

The Champion panel raiser head in question was manufactured by the defendant Woodworkers Tool Works, Inc., an Illinois corporation, located at 222 South Jefferson Street, Chicago, Illinois [R. 272].

One Jerome B. Townsend, a salesman for the Woodworkers Supply Company of Los Angeles, California [R. 249], a retailer of woodworking machinery and supplies [R. 251], testified that he took the order from Selby Company for the purchase of the Champion panel raiser head [R. 249]. He related that he showed the plant superintendent of Selby Company a catalogue published by the Woodworkers Tool Works, Inc., of Chicago, Illinois [R. 260], and that Selby Company specified that it was the

Champion brand of panel raiser head that Selby Company wanted [R. 255]. The Woodworkers Supply Company carried no panel raiser heads in stock [R. 251] but sent an order to the Woodworkers Tool Works, Inc., and requested that the Champion panel raiser head be shipped direct to Selby Company [R. 249]. It was further testified that Woodworkers Supply Company handles hundreds of products other than those manufactured by Woodworkers Tool Works, Inc., and that the latter corporation owns no interest in nor has anything to do with fixing the policy of Woodworkers Supply Company [R. 251]. Woodworkers Tool Works, Inc., billed Woodworkers Supply Company for the Champion panel raiser head [R. 275] and the latter company billed Selby Company [R. 266].

Selby Company received the Champion panel raiser head on October 25, 1948, via air express [R. 80] and one Michael L. Chirby, with the aid of plaintiff, installed it on a Porter double spindle shaper [R. 109]. Plaintiff, who had no previous experience with this particular type of panel raiser head [R. 157] first operated the device for approximately one hour on October 27, 1950 [R. 141], and was operating it on the morning of October 28, 1950, when the injury to his hand occurred [R. 141]. The plaintiff was the only eyewitness as to what occurred.

Plaintiff testified that to the best of his recollection he owed between $350.00 and $400.00 for medical bills [R. 202]. He presented medical testimony of two doctors who had treated him [R. 209, 228], neither of which testified to the amount of his bill for services or as to the reasonableness of the amount claimed to be owed by plaintiff.

Specification of Errors.

I.

The trial court erred in denying the defendant's motion to dismiss the action or in lieu thereof, to quash the return of service of summons on the following grounds [R. 7]:

(1) That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois and was not and is not subject to service of process within the Southern District of California.

(2) That the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of E. H. Preuer and Robert E. Dunne hereto annexed as Exhibits "A" and "B" respectively.

EXHIBIT A. AFFIDAVIT OF E. H. PREUER.

"State of California,
County of Los Angeles—ss.

E. H. Preuer, being first duly sworn, deposes and says: That he is the sole owner of Woodworkers Supply Company, 1222 Santa Fe Avenue, Los Angeles, California; that on or about the 27th day of January, 1949, he was served with a copy of summons and complaint in the above-entitled action; that he is not an officer, a managing or general agent, or an agent authorized by appointment or law to receive service of process for and/or on behalf of Woodworkers Tool Works, a corporation, which is a corporation organized and existing under and by virtue of the laws of the State of Illinois.

/s/ E. H. PREUER.

Subscribed and sworn to before me this 25th day of Feb. 1949.

/s/ Illegible,

Notary Public in and for said County and State."

EXHIBIT B. AFFIDAVIT OF ROBERT E. DUNNE.

"State of California,
County of Los angeles-ss.

Robert E. Dunne, being first duly sworn, deposes and says: That he is one of the counsel for defendant, Woodworkers Tool Works, a corporation organized and existing under and by virute of the laws of the State of Illinois; that up to and including the date of this affidavit neither said defendant, nor any of its agents or employees, have been served with process in the above-entitled action; that said defendant was not at the time of the service of process upon E. H. Preuer, and is not now, doing business in the State of California so as to render it amenable to the service of process in this action.

/s/ ROBERT E. DUNNE.

Subscribed and sworn to before me this 25th day of Feb. 1949.

/s/ ELIZABETH P. WILLIAMS

Notary Public in and for said County and State."

II.

The trial court erred in denying defendant's motion for a judgment of nonsuit on the following grounds [R. 219]:

(1) That there has been no evidence introduced that the defendant manufactured the item in question.

(2) There has been no evidence that the defendant sold the device to plaintiff's employer.

(3) There has been no evidence showing a causal connection between the breaking of the device and the injuries sustained by the plaintiff.

III.

The trial court erred in charging the jury as follows: [R. 442-44, 463-64]:

"There is in our law a doctrine applying to negligence cases which is commonly known as the doctrine of *'res ipsa loquitur.'* Literally translated from the Latin, this means, 'the thing speaks for itself.'

"That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter.

"However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection."

To which instruction the defendant objected on the following grounds [R. 452]:

"Mr. Callaway: I want to object to giving of the instructions on the doctrine of *res ipsa loquitur* on the ground that the courts have not extended that doctrine to the case of the manufacturer, to my knowledge, except in the beverage cases. Even *Mac-*

Pherson v. Buick is not a *res ipsa loquitur* case. I think that is the leading case on which all these cases are bottomed."

IV.

The trial court erred in denying defendant's motion for a directed verdict on the following grounds [R. 425]:

"Mr. Callaway: Yes. At this time the defendant wishes to move the court to direct a verdict in favor of the defendant on the grounds that no negligence has been shown in connection with the manufacture of the device in question, and that there is no cause or connection between the defect, if any, of the device and the injuries received by the plaintiff."

V.

The trial court erred in denying defendant's motion for a judgment *non obstante veredicto,* or in the alternative for a new trial, on the following grounds [R. 56]:

(1) The verdict was contrary to law in that the special damages awarded to plaintiff were in excess of those pleaded or proven.

(2) The evidence was insufficient to justify the verdict of the jury in that there was no evidence of negligence on the part of this defendant.

(3) It was error for the Court to:

(a) Fail to grant this defendant's motion for a judgment of nonsuit at the close of plaintiff's case;

(b) Instruct the jury that the doctrine of *res ipsa loquitur* was applicable.

VI.

The trial court erred in permitting the foreman of the jury to impeach the verdict of the jury in granting appellee's motion to amend the verdict [R. 62-68].

Summary of Argument.

The Champion panel raiser head, a woodworking tool used for the beveling of panels and the breaking of which instrument appellee contends injured his hand, was manufactured by the appellant Woodworkers Tool Works, Inc., an Illinois corporation. Appellant has no offices or salesmen in the state of California but publishes a catalogue of its products, a copy of which catalogue the Woodworkers Supply Company of Los Angeles, and independent wholesaler, owned by one E. H. Preuer, used. Selby Company, a manufacturer of sash and doors and the employer of appellee, ordered from the Woodworkers Supply Company of Los Angeles such a Champion panel raiser head. This wholesaler did not stock the product, therefore ordered it from the appellant in Chicago, which panel raiser head, for the purpose of expediency, was sent directly to Selby Company pursuant to the wholesaler's instructions. Appellant billed Woodworkers Supply Company and Woodworkers Supply Company in turn billed Selby Company. Selby Company received the panel raiser head via air express three days before the accident during which interval it was handled by several persons including one Michael Chirby who installed it.

The appellee purportedly injured his right hand while operating a woodworking machine known as a shaper upon which the Champion panel raiser head was mounted. At the time of appellee's injury it was discovered that the casting of the panel raiser head was broken and although appellee did not know what actually caused his injury (other than that he had heard a faint click in the

panel raiser head, let loose of the board he had been feeding into the machine and ducked under the table), he brought this action against the appellant for the negligent manufacture of the said panel raiser head.

Appellant, a foreign corporation with no officers or agents in California, was at no time or place ever served with process in this action. Instead, appellee made service upon E. H. Preuer as agent of the Woodworkers Supply Company. This fact was brought to the attention of the trial court on a motion to dismiss the action and quash the return of service. However, for some unknown reason the Court ignored this essential point and denied the motion.

Appellee testified at the trial that his medical expenses totaled between $300.00 and $400.00 and presented two doctors who treated him. However, no testimony was presented by either of the doctors as to medical expenses or the reasonableness thereof. At the close of the trial the jury returned a verdict in favor of appellee and fixed the special damages at $8,000.00 and the general damages at $1,000.00. Appellee moved the Court for an amended verdict on the basis of an affidavit of the jury foreman stating that the amounts awarded were $1,000.00 for special damages and $8,000.00 for general damages. The motion was granted and an amended judgment was entered accordingly.

On the above facts it is urged that: (1) The trial court had no jurisdiction over this action for the reasons that: (a) the appellant was never served with process; (b) the

appellant was not amenable to process within the state of California; and (c) that neither E. H. Preuer nor Woodworkers Supply Company were the authorized agents of appellant to receive service of process. (2) The evidence fails to disclose any negligence on the part of appellant or any causal connection between the breaking of the panel raiser head and the injury. (3) The doctrine of *res ipsa loquitur* is not applicable to the facts of this case. (4) No evidence having been presented by appellee as to the reasonableness of his medical expense the jury acted contrary to law in awarding appellee special damages. (5) To permit the foreman of the jury to impeach the verdict was prejudicial error of the Court.

ARGUMENT.

I.

Appellant Was Never Served With Summons in This Action nor Was Appellant Subject to Service of Process Within the Southern District of California. Therefore, the Trial Court Erred in Denying the Motion to Dismiss the Action and Quash the Return of Summons.

The question of jurisdiction must be decided first and where it clearly appears that jurisdiction is wanting the Court should so find and proceed no further. See *Fletcher v. Gerlach,* 7 F. R. D. 616.

1. Appellant Was Never Served With Process in This Action.

The summons and complaint in this action was served on one Elmer Preuer as agent for Woodworkers Supply Company [R. 498]. No process has ever been served upon Woodworkers Tool Works, Inc., the appellant herein, nor any of its agents or employees [R. 11.] Nor has any person purportedly been served as agent of Woodworkers Tool Works, Inc.

Woodworkers Supply Company of Los Angeles, California, is a sole proprietorship owned by Elmer Preuer [R. 265] and is not a party to this action. Woodworkers Tool Works, Inc., the appellant herein, is an Illinois corporation, located in Chicago, Illinois [R. 272].

Though both business firms use the word "Woodworkers" in their title each is an entirely separate entity. There was no identity of interest or exercise of control of one over the other [R. 266-67, 274, 284].

E. H. Preuer is not employed by, nor does he have any ownership interest in Woodworkers Tool Works, Inc.

Likewise, Woodworkers Tool Works, Inc., has no connections with Woodworkers Supply Company [R. 274].

Therefore it is self-evident that appellant was never served with summons in this action. In consequence, the service of process upon E. H. Preuer should have been rejected as invalid and the action dismissed.

Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process; or service must be made in the manner prescribed by a statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 4d (3) (7) of the Fed. Rules of Civil Proc.

Mas v. Owens-Illinois Glass Co., 34 Fed. Supp. 415;

Cannon v. Time, Inc. et al., 115 F. 2d 423;

Hedrick v. Canadian Pacific Railway Co., 28 Fed. Supp. 257.

2. Appellant Was Not and Is Not Subject to Service of Process Within the Southern District of California.

Whether appellant Woodworkers Tool Works, Inc., was doing business within the state, and whether the person served was an authorized agent, are questions vital to the jurisdiction of the Court. A decision of the District Court on either question, if duly challenged, is subject to review in the Appellate Court; and the review

extends to findings of fact as well as to conclusions of law.

Herndon-Carter Co. v. James N. Norris & Co., 224 U. S. 496, 32 S. Ct. 550, 56 L. Ed. 857;

Wetmore v. Rymer, 169 U. S. 115, 18 S. Ct. 293, 42 L. Ed. 682.

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent."

St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 226, 33 S. Ct. 245, 57 L. Ed. 486, 488.

Appellant Woodworkers Tool Works, Inc., located at 222 South Jefferson Street, Chicago 6, Illinois, is an Illinois corporation [R. 272]. It has no place of business outside of Chicago, Illinois. It has no salesmen or agents in the state of California [R. 273]. There is no one in California who is authorized to represent appellant nor has Woodworkers Supply Company or E. H. Preuer ever at any time been authorized to act as agent of appellant [R. 274-5].

The trial court having completely ignored the fact that E. H. Preuer had been served as agent of Woodworkers Supply Company [R. 499] ruled on appellant's motion under the obvious misapprehension that E. H. Preuer had been served as agent of the appellant. Even if it be assumed, despite the foregoing facts, that service had been made upon Preuer as agent of appellant such at-

tempted service would have been made upon one not authorized to act as appellant's agent.

The deposition of William Victor Knourek, vice president in charge of production of Woodworkers Tool Works, Inc., taken in Chicago prior to the trial, was read into the record at the trial. His testimony was read by Mr. Callaway and the questions propounded to Mr. Knourek were read by Mr. Lopardo. We quote therefrom [R. 273-75]:

"Mr. Lopardo: Do you have any salesmen in the state of California?

Mr. Callaway: No sir, we do not.

Mr. Lopardo: And do you have any place of business in the state of California?

Mr. Callaway: We do not.

Mr. Lopardo: Do you have any agents in the state of California?

Mr. Callaway: We do not.

Mr. Lopardo: Is there anyone in California who is authorized to represent your company in a business way?

Mr. Callaway: There is not.

Mr. Lopardo: The Woodworkers Supply Company, do they have any connection with your company?

Mr. Callaway: They do not.

Mr. Lopardo: And have they at any time been authorized to act as your agent?

Mr. Callaway: No sir.

Mr. Lopardo: Now, Mr. E. H. Preuer of that company, is he employed by your company?

Mr. Callaway: No sir.

Mr. Lopardo: Then, the only dealings that you have had with the Woodworkers Supply Company is

that you have sold them some raiser heads; is that correct?

Mr. Callaway: Panel raiser heads, and other tools we manufacture.

Mr. Lopardo: Those sales, were they made here in Chicago, or elsewhere?

Mr. Callaway: The orders were mailed in to us from out of state.

Mr. Lopardo: And then you delivered the merchandise to whatever carrier they designated, is that correct?

Mr. Callaway: That is right.

Mr. Lopardo: The panel raiser head in question, that was delivered to air freight, is that correct?

Mr. Callaway: That is right.

Mr. Lopardo: And you received an order from Woodworkers Supply Company requesting you to sell them two panel raiser heads, is that correct?

Mr. Callaway: That's right.

Mr. Lopardo: And you delivered them pursuant to their directions to air freight for delivery?

Mr. Callaway: I believe we only shipped one air freight; the other one was regular express, if there were two.

Mr. Lopardo: And then you billed them for these two items, did you not?

Mr. Callaway: We did.

Mr. Lopardo: They were not acting as your agents or servants in making a sale?

Mr. Callaway: They were not.

Mr. Lopardo: And the transaction between you and the Woodworkers Supply Company was merely that of vendor and vendee, of seller and purchaser?

Mr. Callaway: That is right."

We quote from the testimony of Elmer H. Preuer [R. 265-67]:

"Q. Mr. Preuer, your business or occupation? A. Machinery supply business.

Q. What firm or style do you do business under? A. Operating under the name of Woodworkers Supply Company, individual ownership.

Q. Partnership or sole proprietor? A. Individual ownership.

Q. Who owns it? A. I do.

Q. How long have you been in business? A. Since 1928.

Q. 1928? A. Yes.

The Court: He is from the concern, or the local concern?

Mr. Callaway: Local concern.

The Court: All right. Go ahead.

Q. (By Mr. Callaway): What relationship do you have with the Woodworkers Tool Works in Chicago?

Mr. Olson: To which I object. It is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: We buy and sell machinery and supplies, and in our course of business there are certain items that are manufactured by the Woodworkers Tool Works which we sell on a commission basis.

Q. (By Mr. Callaway): By that do you mean you pay them a certain price? A. They bill us and we, in turn, bill the customer.

Q. They bill you the wholesale price and you bill the customer the retail price? A. They would bill us, if an item were $75.00 they would bill us $75.00 less 10 per cent.

Q. Do they have any financial interest in the concern? A. Our company?

Q. Yes. A. None whatsoever.

Q. Have they ever had? A. No, sir.

Q. Do you represent any other people who made woodcutting or working machinery? A. A hundred accounts.

Q. Beg pardon? A. About a hundred accounts.

Q. A hundred manufacturers? A. That is right.

Q. Did your concern sell a panel raiser head to the Selby Company? A. Yes, sir.

Q. Did you bill the Selby Company for that? A. Yes, sir.

Q. Did, in turn, the Woodworkers Tool Works bill you for it? A. Yes, sir.

Q. Did they give you any instructions as to how you should operate your business or sell that product? A. No, sir.

Q. In other words, the relationship is solely buying from them at wholesale and selling at retail? A. That is correct.

Q. It is not unusual, is it, Mr. Preuer, where you place an order for some manufacturer, where you don't carry the item in stock, to have them ship direct to the buyer? A. That is often done.

Q. It was done in this case? A. Especially where the customer is in a hurry and requests it to come air express.

Mr. Callaway: That is all."

If the trial court's ruling that proper service was effected is to be upheld it would be just as ridiculous if a person were to go to a local department store and enter a subscription to a popular national magazine such as Time or Newsweek and then sue the magazine by serving the department store.

The affidavit of William R. Walker [R. 15] even if given full credence does not justify the lower Court's ruling. The mere possession of the catalogue of a manufacturer certainly is not sufficient to constitute one an agent for the purpose of the service of process, and certainly a representation by a salesman of an independent wholesaler that he represented the Woodworkers Tool Works, Inc. would be but a self-serving conclusion at best. The affidavit of Ray Taylor [R. 11, 12, 13] is certainly of no aid, based again on conclusions and hearsay, and even if taken at its full value would not have the effect of constituting Mr. Preuer as owner of the Woodworkers Supply Company, an agent of the appellant, for the purpose of effecting valid service of process upon appellant. Aside from these two affidavits there is nothing in the record which even tends to support appellee's contention that the jurisdiction of the District Court was properly invoked.

Upon the foregoing facts it is submitted that (1) appellant was never served with process in this action; (2) appellant is not doing business in California in any manner as to make it subject to service of process; (3) neither Preuer nor the Woodworkers Supply Company is or was an authorized agent of Woodworkers Tool Works, Inc.

II.

Appellee Failed to Produce Any Evidence of Negligence or of Causal Connection Upon Appellant's Part. Therefore, the Trial Court Erred in Denying the Motions for Nonsuit, Directed Verdict and Judgment Non Obstante Veredicto.

1. The Evidence Fails to Establish Any Negligence on the Part of the Appellant.

> "In this state, negligence is not presumed from the mere fact of injury."
>
> *Depons v. Ariss,* 182 Cal. 485, 488, 188 Pac. 797.

It is fundamental that, before recovery may be had by a plaintiff, it must be established that the defendant was negligent. The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant.

> *Hubbert v. Aztec Brewing Co.,* 26 Cal. App. 2d 664, 688, 80 P. 2d 185;
>
> *Miller v. Cranston,* 41 Cal. App. 2d 470, 107 P. 2d 963.

The evidence is uncontradicted and appellant conclusively proved that it made between five and seven inspections of the Champion panel raiser head before it was shipped [R. 302, 337-358]. Not one scintilla of evidence was introduced by plaintiff to show or tend to show that the appellant had the duty to do anything more than the inspections thus made. That these inspections on the part of appellant constituted reasonable inspection of an ordinarily prudent manufacturer was in nowise contradicted by appellee. Though appellee did introduce evidence of various tests [R. 192, 194] none of them was shown to be a

feasible or reasonable test and, in fact, Mr. Cheney, the appellee's own expert, positively testified that the only reasonable tests or inspections in this type of case were visual inspection and X-ray [R. 194]. It was at this point that the Court informed the jury that the X-ray test was so expensive that it was not reasonable in the premises [R. 193].

While the appellant may have had a duty to make an inspection of the panel raiser head it is not responsible for defects that cannot be found by a reasonable, practicable inspection. (*Honea v. City Dairy, Inc.,* 22 Cal. 2d 614, 618, 140 P. 2d 369; *Sheward v. Virtue,* 20 Cal. 2d 410, 414, 126 P. 2d 345; *O'Rourke v. Day & Night Water Heater Co.,* 31 Cal. App. 2d 364, 369, 88 P. 2d 191; *Smith v. Peerless Glass Co.,* 259 N. Y. 292, 181 N. E. 576.) In the instant case there is no evidence that a feasible means of discovering the defect or flaw was available to this appellant. Here no negligence on the part of appellant was shown nor can any be implied from the circumstances of the accident.

We quote from the case of *Honea v. City Dairy, Inc., supra,* excerpts peculiarly applicable to the facts of the instant case and which we deem determinative:

> "In the Bruckel case the court said (102 N. Y. S. 398): 'There is no proof that inspection or examination of the bottle would have made its defect known to the most careful vendor or even to an expert in his employ. It does not appear that either one or the other could have ascertained the defect by any test short of those made by the expert witness of the plaintiff. If the fact were otherwise, it was the duty of the plaintiff to give evidence thereof; and in the absence of all evidence the jury cannot grope in speculation for a test or assume that there was one.'

"The limit of its duty was to provide against defects discernible upon reasonable inspection and to handle the bottles with reasonable care. *There is not anything to show it failed of duty in these respects. We cannot conjecture that it may have done so.* The mere happening of the accident did not establish negligence, and that only was shown. The proof offered by plaintiff clearly failed to support the burden imposed upon him. As was said by the learned court below: 'Under the evidence the only reasonable inference that can be deduced is that the accident was due to a latent unsuspected defect. *McSorley v. Katz,* 53 Pa. Super. 243.' "

2. The Evidence Fails to Establish Any Causal Connection Between the Breaking of the Panel Raiser Head and the Injury Sustained by Appellee.

Appellee testified that he was running a panel through the raiser head when he heard a faint click [R. 142, 165]; that he then dropped below the table top and stopped the machine by putting his left foot on the emergency brake [R. 142, 151-2, 154]; that he stayed underneath the table until things stopped dropping and then he got up and looked around [R. 143]; he first looked at the machine and then he looked at himself and observed that his hand and little finger were cut [R. 143]; that one to one and a half minutes elapsed between the time he heard the faint click and observed his injury [R. 165].

Appellee was not conscious of any object striking him [R. 160] and, as a matter of fact he does not know what cut his hand [R. 171].

Thus, one must resort to conjecture or surmise to determine the cause of appellee's injury. This is borne out

by the following testimony of appellee, who was the only eyewitness to the incident in question. At page 142 of the transcript of record:

"Q. Now, what time, to the best of your knowledge, did this accident occur? A. About 8:35 in the morning.

Q. Did you have any warning that it was going to occur? A. I heard a faint click.

Q. While you were working with this wood you heard a faint click? A. Yes.

Q. What, if anything, did you do when you heard that click? A. I went below the table top.

Q. You dropped below the table top when you heard the click? A. Yes, sir.

Q. Calling your attention again to Plaintiff's Exhibit 3, the front page, you say that is the relative position you were standing in at the time of the accident? A. Yes, sir.

Q. In other words, when you dropped then you would be just where this man would be if he fell down? A. Yes, sir.

Q. Do you know, of your own personal knowledge, how fast that shaper was going at the time of the accident? A. It was supposed to be around 7200 r.p.m.'s, revolutions per minute.

Q. You can assume it was going 7200 revolutions per minute when the accident happened? A. Yes.

Q. As I get it now you heard a sharp click and you dropped to the ground? A. Yes.

Q. You dropped to the ground when that happened? A. Yes.

Q. Then what happened after the place had quieted down? A. I got up and looked around, to

see if anybody was around, or anything. That perhaps somebody would have been hit by whatever flew apart.

Q. Then what did you do? A. Then I started to look at the machine, to see what happened.

Q. Did you find you were injured yourself in any way? A. I took a quick look at the machine and then I figured I had better look at myself.

Q. Did you finally look at yourself? A. Yes.

Q. What did you observe when you looked at yourself? A. That my hand was cut across the palm, and my little finger was just barely on."

Then, at page 154:

"Q. Mr. Byrne, what struck this particular arm that was broken off? A. That I do not know.

Q. I take it, of course, that at the speed at which this top member was traveling that you couldn't determine whether the arm was broken before the slipping took place on the shaft or afterward? A. No, sir."

And, at page 160:

"Q. Now, you were not conscious of any object striking you, were you? A. No, sir.

Q. The first thing you knew was that after an elapse of two or three minutes you looked down and saw your hand was bleeding, isn't that true? A. Yes, sir."

And, at page 164:

"Q. (By Mr. Olson): Do you know what struck the arm?

The Court: I would like to find out from you yourself, Mr. Byrne.

The Witness: I do not know, your Honor.

The Court: You do not know?

The Witness: No.

Q. (By Mr. Olson): Do you know whether anything struck the arm? A. No, sir.

The Court: As a matter of fact, you were not conscious of the injury to your hand until you began raising yourself up?

The Witness: That is right.

The Court: For all you know, you may have cut your hand on something under the table?

The Witness: There was nothing under the table, your Honor, that could have cut me.

The Court: Was there any blood around? Did you observe whether there was any blood around the cutter that would indicate you were cut while you were operating on top of the table?

The Witness: No, there wasn't any blood or anything to indicate it before the machine broke.

The Court: When did you first see the blood, right after you got up, and was it on the floor?

The Witness: After I got up there was blood on the floor.

The Court: Was there a trickle of blood from the table on which you were operating the machine to the place where you stooped?

The Witness: In the excitement I couldn't tell you, your Honor.

The Court: I do not blame you. You were hurt pretty badly. We are just trying to find out what you do remember.

The Witness: As soon as I hit the floor, and I waited, when I got up, why—

The Court: Can you give us an idea of the lapse of time between the time you were hurt, when you heard the—what did you call it, a noise?

The Witness: A click, a sort of a click.

The Court: —you heard the click and the time you felt any sensation of injury to your hand or numbness? I asked you a question before and you said something about your hand feeling numb.

The Witness: Yes, it was. In other words, it was more or less paralyzed. I moved my left hand before the right.

The Court: Give me first the lapse of time, if you can tell.

The Witness: Approximately, maybe a minute, a minute and a half.

The Court: That feeling came to you as you were already stooped, or did it come before?

The Witness: The numbness?

The Court: Yes.

The Witness: I didn't notice it until I got up on my feet.

The Court: You were not aware of any sensation of pain or numbness before you had actually stooped under the table?

The Witness: No, sir. There was quite a bit of noise, and so forth.

The Court: I understand that.

The Witness: I may have felt it. In my opinion I don't believe I did.

The Court: You do not remember.

The Witness: No.

The Court: You do not remember the feeling?

The Witness: No.

The Court: So you are sure, however, that it was not simultaneous? There was a lapse of time between your hearing the click and your feeling any sensation of having numbness or hurting in your hand? That feeling was after you had already stooped down, is that correct?

The Witness: Yes, sir. When something that fast hits you, you don't—

The Court: On direct examination you said something about that fact that the reason you ducked, as it were, was sort of instinctive, that you were trying to avoid things flying in all directions? Is that what you said?

The Witness: Yes.

The Court: Do you remember anything actually flying in all directions before you stooped or was it that you just did it instinctively, unconsciously?

The Witness: I remember as my head got below the tabletop things flying across my head and coming down.

The Court: Before you ducked or stooped down you do not remember seeing anything?

The Witness: No, sir.

The Court: I will put it this way: Did anything else accompany this click that you heard, such as scattering of things?

The Witness: Not until after I was under the table.

The Court: Do you remember what portion of your hands were on the board?

The Witness: Yes, your Honor.

The Court: That is, when you heard the click?

The Witness: I was running the board through the shaper in this manner (indicating), and I heard the click and I just went down. This hand was the last to go down because it was the furthest away (indicating)."

Proof, such as the foregoing, which leaves it doubtful whether an injury was the result of one of several causes is insufficient. The question of causal connection should not be left to the guess, conjecture or surmise of the jury.

> *San Joaquin Grocery Co. v. Trewhitt,* 80 Cal. App. 371, 252 Pac. 332.

Applying this rule to the evidence reviewed it is readily apparent that such evidence presented no basis for the conclusion of the jury other than mere speculation.

> *McKellar v. Pendergast,* 68 Cal. App. 2d 485, 489, 156 P. 2d 950.

III.

The Trial Court's Charge to the Jury of the Doctrine of Res Ipsa Loquitur Was Prejudicially Erroneous.

1. On the Facts Presented in This Case the Plaintiff Was Not Entitled to an Instruction on the Doctrine of Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* does not apply unless the basic requisites of exclusive control and probability of negligence are proved by plaintiff.

Gerhart v. Southern Cal. Gas Co., 56 Cal. App. 2d 425, 431, 132 P. 2d 874;

Laganzo v. San Joaquin L. & P. Corp., 32 Cal. App. 2d 678, 695, 90 P. 2d 825;

Honea v. City Dairy, Inc., supra.

Appellant relinquished control of the Champion panel raiser head on October 23, 1948, in Chicago, Illinois, when it was shipped air express to the Selby Company in Burbank, California [R. 290]. On October 25, 1948, it was received by Selby Company [R. 80] and then handed to one Michael L. Chirby [R. 105], an employee of the General Panel Corporation, the latter being the landlord of Selby Company [R. 82]. Chirby removed the panel raiser head from its container and he and two or three other men inspected the device [R. 106]. Later, Chirby and the plaintiff installed the panel raiser head on a Porter shaper [R. 109, 111]. The device was in use on the day prior to the accident [R. 141] and was in use on the morning of the accident. Thus, five days had intervened between the time that the panel raiser head had left the control of the defendant and the injury. Anything that transpired during that interval was certainly beyond the exclusive control of defendant.

Under the facts shown in the instant case the conditions warranting application of the doctrine have not been satisfied.

2. **The Courts Have Not Extended the Doctrine of Res Ipsa Loquitur to Manufacturers of Instrumentalities Such as the Panel Raiser Head Herein Involved Where the Instrumentality Has Passed Out of the Possession and Control of the Defendant and Is Exposed to Tampering and Adjustments by Others.**

If this were not true it would defeat the true reason for the rule, namely, that the circumstances surrounding the causing of the accident were such that the injured party is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident. The reasons are numerous as to why the doctrine should not be applicable to the case at bar. The undisputed testimony is that the instrumentality had been shipped by the appellant, received by appellee's employer, inspected by two or more of appellee's fellow employees, installed by them on the shaper, and used for a part of two separate days. How then can it be said that the appellant is in the better position to explain the cause of the accident? How then should the appellant be reasonably expected to know and be able to explain the "precise cause of the accident?" If such were the rule it would be tantamount to making the liability of the manufacturer absolute, regardless of what might have happened between the time that the instrumentality left its possession and the occurrence of the accident to cause the instrumentality to break or fail. It will be remembered that this was a new piece of mechanism in both

design and character in-so-far as the appellee and his fellow employees were concerned. Appellant would not be in a position to know whether it was properly installed or properly used. The physical evidence would tend to indicate that the proper space between the two blades had been distorted after the accident. This could have been caused by a blow against one of the blades while in rapid revolution, it could be caused by the wood that was being cut not being held in proper position, or numerous other ways which the appellant is in no position to explain and by no strength of the imagination liable for.

It is peculiar to this brief-writer that if the appellee's hand was cut by a piece of the mechanism flying off, it would not have resulted in considerable bruising around the cut area. Whereas Dr. Detwiler testified that the wound had a macerated appearance, which he explains means "chewed up" [R. 236], that it could have been caused by a piece of wood striking the hand [R. 241], which could, of course (coupled with the fact that the plaintiff did not know he was injured for a minute or two), indicate that he actually brought his hands too close to the cutting edges, which caused him to turn loose of the piece of wood he was cutting, thereby breaking one of the arms and blades off of the machine. The X-rays show a very clearly defined fracture line [R. 244], and that the injury could have been easily caused by coming in contact with the raiser head when in motion [R. 245]. It has been said aptly that this special doctrine applies only under special circumstances, namely, (1) the instrumentality by which the injury to plaintiff was approximately caused was in the possession and under the *exclusive control* of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that injury was caused

by some act or omission incident to defendant's management; (2) that the accident was one of such a nature as does not happen in the ordinary course of things, if those who have *control* of the instrumentality used ordinary care; (3) the fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident.

It is only when all these conditions are found to have existed the inference of negligence to which they give birth will support a verdict for the plaintiff in absence of a showing by the defendant that offsets the inference. The foregoing is taken almost verbatim from the California Jury Instructions 206C published by West Publishing Company and compiled by a committee appointed to the task by the presiding judge of the Superior Court, of the Los Angeles Bar Association, and the Lawyers' Bar of Los Angeles County, consisting of eminent trial jurists and eminent practitioners at this bar. That the facts in this case fail to meet any of the prerequisites of the doctrine seems readily apparent. To further extend the application of the doctrine seems unjustifiable and placing a burden upon one party to a damage case without any sensible reason behind it.

It is submitted that the decision of *Escola v. Coca Cola Bottling Co.,* 24 Cal. 2d 453, 150 P. 2d 436, drastically extended the prevailing rule in California as to the appli-

cation of the doctrine of *res ipsa loquitur*. In that case the plaintiff suffered injuries when a bottle of Coca Cola exploded and the court held that the doctrine was applicable. However, it cannot be too strongly urged that the decision was intended to apply only in cases involving containers of carbonated beverages. As stated on page 457 of the *Escola* case, "Many jurisdictions have applied the doctrine in cases involving exploding bottles of carbonated beverages."

IV.

The Verdict of the Jury Was Contrary to Law in That the Special Damages Awarded to Plaintiff Were Neither Pleaded or Proven.

1. The Jury Completely Disregarded the Law Relating to Special Damages as Given to Them by the Court.

> "Special damages are those that are the natural, but not the necessary, result of the act complained, and not being implied by law, *they must be particularly pleaded and proven.*" *Morris v. Allen,* 17 Cal. App. 684, 688; 121 Pac. 690; *Moore v. Fredericks,* 24 Cal. App. 536; 141 Pac. 1049; *Skaggs v. Wiley,* 108 Cal. App. 429, 434; 292 Pac. 132.

Plaintiff's complaint prayed for "medical expenses when the total has been ascertained" [R. 26]. At no time did plaintiff amend his complaint to insert therein any particular amount of medical expenses claimed by him [R. 151].

At the close of the trial the court instructed the jury that special damages is the subject of direct proof and is

to be determined by the jury on the evidence before them [R. 447]. The court further instructed the jury that such damages must be of a reasonable value [R. 448].

A review of the reporter's transcript reveals that the record is absolutely devoid of any testimony or other proof relative to the reasonable value of medical services. Plaintiff put two of the three doctors who had treated him on the stand and neither doctor gave one iota of testimony as to his fees nor as to the reasonableness of any fees for medical services rendered. Nowhere in the testimony of Dr. Howard F. Detwiler [R. 228-246] nor of Dr. Ross Sutherland [R. 209-217] is there any evidence of the cost of their services for the care and treatment of plaintiff.

It is well established law in California that in proving special damages based upon medical services required, the proper measure of damages is the reasonable value of such services. Even the mere introduction of medical bills, without proof of the reasonableness of the charge for the services rendered or that said bills have been paid, is not sufficient evidence to support a finding of special damage.

Latky v. Wolfe, 85 Cal. App. 332, 259 Pac. 470.

It is therefore submitted that in a complete and utter disregard of the instructions of the court and despite the obvious fact that there was presented not one iota of proof as to the reasonableness of the medical services the jury arbitrarily returned a verdict for special damages.

V.

It Was Grave Prejudicial Error for the Trial Court to Permit the Foreman of the Jury to Impeach the Verdict of the Jury.

In support of the plaintiff's motion to amend the verdict he attached thereto the affidavit of George F. Caldwell, Foreman of the Jury, which in substance stated that an error was made in filling in the amount awarded as special damages and the amount awarded as general damages [R. 63-4].

The general principle is well stated at page 607 in *De Garmo v. Luther T. Mayor, Inc.,* 4 Cal. App. 2d 604, 41 P. 2d 366:

> "Upon well grounded considerations of public policy jurors are legally disabled to impeach their verdict by any means, whether it be by affidavit or by testimony or by extra-judicial statements." See:
>
> *People v. Reid,* 195 Cal. 249, 261, 232 Pac. 457;
>
> *Walter v. Ayvazian,* 134 Cal. App. 360, 25 P. 2d 526.

Similarly, in Federal Courts, the jurors may not impeach their own verdict.

> *McDonald v. Pless,* 238 U. S. 264, 59 L. Ed. 1300, 35 S. Ct. 783.

On February 21, 1950, the jury rendered the following verdict [R. 52]:

> "We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against

the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff's special damages at Eight Thousand Dollars, and fix plaintiff's general damages at One Thousand Dollars."

On order of the court, the jury was polled and each member thereof stated that the *verdict as presented and read* was his verdict [R. 53]. (Italics ours.)

Despite the fact that each of the eleven other jurors, as well as the foreman, personally stated to the court that the verdict was correct as presented and read, the one lone affidavit of the foreman, which had been signed and sworn to on March 9, 1950, *sixteen days after the verdict was rendered,* was permitted to impeach the verdict of the twelve jurors. (Italics ours.)

Conclusion.

The foregoing discussion of the matters preceding the trial and of the evidence adduced at the trial shows:

1. That defendant was never served with process in this action and consequently the court had no jurisdiction of defendant.

2. That plaintiff presented no proof of negligence on the part of defendant nor did he establish any causal connection between the breaking of the device and the injury sustained by plaintiff.

3. That the doctrine of *res ipsa loquitur* was not applicable in this case.

4. That the jury acted contrary to law in awarding special damages.

5. That the foreman of the jury acted contrary to law in impeaching the verdict of the jury.

It is, therefore, urged that the trial court erred in denying defendant's (1) motion to dismiss, (2) motion for non-suit, (3) motion for directed verdict and (4) motion for judgment *non obstante veredicto.*

For the reasons stated herein it is respectfully submitted that the judgment must be reversed.

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